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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 63

MORGAN C. CHEWNING,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS
OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Appeals of Virginia refused a writ of error by memorandum order without a written opinion (R. 29). The opinion of the Law and Equity Court of the city of Richmond (R. 9-12) is unreported.

Jurisdiction

The order of the Supreme Court of Appeals of Virginia refusing a writ of error was entered on June 14, 1960 (R. 29). The petition for a writ of certiorari was filed in this Court on August 1, 1960, and was granted on March 6, 1961 (R. 31). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

Questions Presented

1. Was petitioner, an indigent prisoner with no counsel, deprived of his liberty without due process of law when, after denial of his request for counsel, he was tried as a recidivist by a state court and sentenced to ten years in the penitentiary?

2. Was petitioner, an indigent prisoner, denied the equal protection of the laws when the court denied him counsel at his recidivist trial, since Virginia law allows counsel at recidivist trials for defendants with money?

Constitutional Provisions and Statutes Involved

The following provisions of the Fourteenth Amendment to the United States Constitution are involved: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code, 1950, § 53-296 provides:

> When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United

States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court may sentence him to further confinement in the penitentiary for a period of not exceeding five years, if he has been once before sentenced in the United States to confinement in the penitentiary; but if he has been twice sentenced in the United States to such confinement, he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.

Virginia Code, 1950, § 19.1-241 provides:

> In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

Statement

This is a habeas corpus proceeding commenced in 1959 in the Law and Equity Court of the city of Richmond, Virginia, by petitioner Chewning, a prisoner in the Virginia State Penitentiary. Chewning sought release from confinement on the ground that the ten-year sentence he is serving, imposed under the state recidivist statute (Va. Code, 1950, § 53-296), is void under Virginia law and under the Fourteenth Amendment to the Federal Constitution because of a denial of counsel in the recidivist trial.[1] The Law and Equity Court denied relief without a hearing (R. 13), and the Supreme Court of Appeals refused a timely petition for writ of error (R. 29). No response to the petition was called for, and no appearance was made on behalf of the respondent or the Commonwealth of Virginia at any stage of the proceedings below. Accordingly, petitioner's undenied allegations (R. 1-4) together with the exhibits to his petition (R. 5-7) furnish the facts of the case and must be taken as true.[2]

On June 25, 1958, the petitioner, then imprisoned in the Virginia Penitentiary, was brought before the Circuit Court

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[1] Habeas corpus is an appropriate Virginia procedure for collaterally attacking a sentence on the ground of denial of the constitutional right to counsel. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953).

[2] *Cash* v. *Culver*, 358 U.S. 633, 634. The Supreme Court of Appeals of Virginia also takes this view. *Morris* v. *Smyth*, No. 5254, Sup. Ct. of Appeals, June 12, 1961.

of the city of Richmond where he was charged by information with having been three times convicted and sentenced to confinement in the penitentiary for a felony (R. 1-2, 5-6). This information and the ensuing trial were based on § 53-296 of the Virginia Code, the so-called recidivist statute. In substance it empowers the court, upon proof by records of three prior penitentiary sentences and of the identity of the defendant with the person named in the records, to sentence the defendant "for such additional time" as the court "may deem proper," presumably up to life imprisonment.

Petitioner alleges that the court proceeded to try, convict and sentence him to ten years imprisonment "without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958" (R. 2).

The trial court order of June 25, 1958, states in part: "The attorney for the Commonwealth filed information . . . the information being read to each of the accused, and each being first cautioned as to his rights, and each acknowledged in open court that he is the person mentioned in the several records of conviction" (R. 7). The court thereupon sentenced petitioner to "undergo a further confinement in the penitentiary for a term of ten years, said term to begin at the end of the present term . . ." (R. 7). This is the sentence under which Chewning is now being held by respondent (R. 1-2).

The entire proceedings from initial notification of the recidivist charge through the sentencing took place in one day—June 25, 1958—while petitioner was not represented by counsel (R. 1-2, 5-7).

Apparently no appeal was taken from the recidivist sentence. But in September, 1959, Chewning, still without

a lawyer, filed this habeas corpus petition in the Richmond Law and Equity Court (R. 1).[3] After appointing counsel (R. 8) and considering the authorities presented by him on behalf of petitioner (but without a response and without hearing evidence) the court denied the petition, stating that "the failure to furnish counsel to Mr. Chewning at his request does not invalidate the sentence given him under Virginia Code Section 53-296" (R. 9).

The trial judge's views on the federal claim are revealed in the following excerpts from his opinion:

> As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In *Gryger* v. *Burke*, 334 U.S. 728, where release on habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731): " . . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid."
>
> This holding was adhered to in *Chandler* v. *Fretag*, 348 U.S. 3 . . . (R. 9).

After further discussion of various authorities the court concluded:

> It thus appears that there is no requirement under the State or Federal Constitution, nor is there any Virginia statute, requiring that the Circuit Court of the city of

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[3] The Law and Equity Court has jurisdiction to grant a writ of habeas corpus where, as here, petitioner is detained within the City of Richmond. Va. Code, 1950, § 8-596 (Supp. 1960); Va. Code, 1950, §§ 17-147, 17-164. Had the writ been granted (which it was not) it would have been made returnable to the Circuit Court of the City of Richmond where the recidivist sentence was imposed. Va. Code, 1950, § 8-598 (Supp. 1960).

Richmond assign counsel to persons brought before it under Code Section 53-296 (R. 12).[4]

Petitioner then sought review by appropriate petition for writ of error in the Virginia Supreme Court of Appeals, again without an attorney (R. 15-19). In his petition he recited the filing of his application for habeas corpus "wherein the petitioner complained that he was being illegally and unjustly held in confinement by the respondent due to the violation of his Constitutional Right to the assistance of counsel when proceeded against as a third offender under Section 53-296. . . ." (R. 19). And he alleged that the trial court erred in denying his habeas corpus petition without a hearing and that "the court erred in holding that failure to furnish counsel to the petitioner at his request does not invalidate the sentence given him under Virginia Code Section 53-296" (R. 20). Still further he asserted that "This case is governed by the rights of an accused, or defendant, under Section Eight of the Virginia Constitution, and the 14th Article of Amendment of the Constitution of the United States" (R. 21).

The Supreme Court of Appeals thereafter entered an order stating that the petition "having been maturely considered and a transcript of the record . . . seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the Law and Equity Court" (R. 29).

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[4] The trial judge held that the Code of Virginia, § 19.1-241, which requires appointment of counsel in "any case in which a person is charged with a felony" does not apply to a recidivist trial (R. 11). Section 18.1-6 of the Virginia Code provides in part: "Such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors."

This Court then granted a petition for writ of certiorari *in forma pauperis* to review the Virginia judgment (R. 31) and appointed counsel to represent the petitioner. 365 U.S. 875.

Summary of Argument

I

Petitioner's trial under the Virginia recidivist statute, § 53-296, was an independent criminal proceeding instituted by information on behalf of the Commonwealth. The Virginia courts view the recidivist proceeding as a criminal case wholly separate from any other judicial proceeding. Its most unusual feature is the discretionary sentencing power vested in the trial judge. For three or more previous convictions he may impose no punishment or he may impose any term of years up to life imprisonment.

Since petitioner's recidivist trial was a criminal case he was entitled to all of the Fourteenth Amendment protections, including the right to counsel, which surround any state criminal defendant. This court has recognized in *Chandler* v. *Fretag*, 348 U.S. 3, and *Reynolds* v. *Cochran*, 365 U.S. 525, that defendants in state habitual criminal cases have the same constitutional right to counsel as defendants in other state prosecutions.

II

Petitioner, without counsel, was tried as a recidivist and sentenced to ten years in the penitentiary. Considering the nature of the Virginia recidivist trial and the number and complexity of issues involved, the court's refusal of petitioner's request for the assistance of counsel operated to deprive him of his liberty with due process of law.

The trial judge's unusually broad discretion in determining a recidivist sentence made the presence of counsel

for petitioner essential to a fair hearing. In changing the sentence from mandatory life imprisonment to "such additional time as the court trying the case may deem proper" the legislature intended for the sentencing to be tailored to individual cases. In view of this and of the need for considering rehabilitation of the defendant, as well as other interests of society, it is important that the judge have before him all relevant information concerning the defendant. It is also vital that a full presentation of such information be made if the defendant is to have a fair hearing on the sentence. Since petitioner was already in the penitentiary he could not possibly assemble such evidence and pr pare his case. The assistance of counsel was essential for his. Moreover, the talents of trained legal counsel were ecessary for the adequate presentation in court of petitio. r's case.

At the trial the state must establish the existence and validity of records of prior convictions within the terms of the statute. The identity of the accused with the person named in the records must also be proved. These matters involve a variety of legal and factual questions to be tried to the court and a jury. The questions are such that only an attorney could recognize them and adequately deal with them. The absence of a lawyer left petitioner to face the prosecutor alone and deprived him of a fair hearing.

In a multitude of decisions the court has recognized the fundamental nature of the right to counsel. There can be no fair hearing for a defendant without counsel, even for a brief interval, as in *Ferguson* v. *Georgia,* 365 U.S. 570. The Court's opinions, particularly those of the last three terms, clearly indicate that sentencing the indigent petitioner to the penitentiary without counsel, despite his request for counsel, violated due process. The only possible argument to the contrary would rest on the outmoded dis-

tinction between capital and noncapital cases stemming from *Betts* v. *Brady*, 316 U.S. 455. That distinction was an anomaly in constitutional law. It was never endorsed by the whole court, and it has now been undermined by recent right-to-counsel decisions. Whatever validity that rule once had, it no longer comports with reason and justice. If it is fundamentally unfair to try a man without counsel when he faces a death sentence, it is no less fundamentally unfair to try him without counsel when he faces life imprisonment. The Fourteenth Amendment protects life and liberty equally. Recent opinions indicate that the court now takes this view.

III

The denial of counsel to the indigent petitioner at his recidivist trial denied him the equal protection of the laws since the law allows counsel to a recidivist defendant with money to obtain counsel. *Griffin* v. *Illinois*, 351 U.S. 12, stands for the proposition that the kind of trial a man gets cannot hinge on his financial means. The pocketbook is an irrational basis for the administration of the criminal law. A trial with counsel is clearly of higher quality than a trial without counsel. A defendant with money would have been allowed counsel; petitioner without money was denied counsel. The only difference is the pocketbook, an impermissible basis for difference in treatment under the Equal Protection Clause.

ARGUMENT

Chewning is before the Court on a state judgment denying his habeas corpus petition without response from the state and without a hearing. The basic question therefore is whether the judgment should be reversed and the case remanded to give petitioner an opportunity to establish at a hearing the claimed violation of his federal constitu-

tional right to counsel. The answer depends upon whether the petitioner's allegations and exhibits, taken as true for this purpose, show prima facie a violation of this constitutional right. *Reynolds* v. *Cochran*, 365 U.S. 525; *Williams* v. *Kaiser*, 323 U.S. 471.

Petitioner contends that the facts thus appearing are sufficient under the Fourteenth Amendment to call for a hearing in the trial court. Both the Due Process and Equal Protection Clauses, either separately or jointly, render void the ten-year sentence imposed on petitioner under the Virginia recidivist law if petitioner establishes at a hearing what he now alleges, that he was without counsel at his trial and that the court, despite his request, refused to appoint counsel to assist him.

I

The Virginia Recidivist Trial Was a Criminal Proceeding in Which the Petitioner Was Protected by the Fourteenth Amendment Right to Counsel.

A. Petitioner's Recidivist Trial Was an Independent Criminal Proceeding Which Subjected Petitioner to Imprisonment in the Penitentiary, at the Judge's Discretion, for a Term of Years or for Life.

Since the earliest days of statehood Virginia has had some form of recidivist or habitual criminal law. The present statute, Virginia Code, 1950, § 53-296, under which petitioner was tried and sentenced, has evolved from the earlier law. An understanding of its salient features is important in this case.

For many years statutes provided that the court should impose additional punishment when a person was convicted of an offense and sentenced to the penitentiary and it was alleged and proven at that trial that he had been

previously so sentenced. For one previous sentence the court was to give an additional five-year term; if the defendant had been twice previously sentenced to the penitentiary life imprisonment was required.[5] In the Code of 1887 those provisions were brought forward, but an additional provision was introduced authorizing a separate proceeding in the Circuit Court of the city of Richmond against any prisoner in the penitentiary who had not already been given the required additional punishment. Virginia Code, 1887, §§ 4180-83, 3905-06. In the event of such a proceeding, the same automatic five-year and life sentences applied. Thus recidivist sentences were fixed by law, and they could be imposed either at the trial of some offense or in a separate proceeding.

The law remained in that form until two major changes were made some twenty years later. In 1916, the Assembly changed the sentence in case of one previous conviction from a rigid five years to "such time not exceeding five years as the court trying the case shall, in its discretion, deem proper. . . ." And for two or more previous convictions the automatic life sentence was modified to "such time as the court trying the case, shall, in its discretion, deem proper . . ."[6] Life imprisonment was not prohibited; its mandatory feature was simply removed. The Code of 1919, § 5054, incorporated those changes and introduced another of significance. It made the recidivist proceeding a separate trial in the Circuit Court of the city of Richmond in all cases; it could no longer be combined with the trial of another offense. A revisors' note in the 1919 Code explains:

> . . . The revised section makes one material change in the law. Under it the subject of prior conviction can-

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[5] See, e.g., Va. Code, 1849, tit. 54, ch. 199, §§ 25, 26, p. 752.

[6] Acts of 1916, ch. 29, 30, pp. 34-35.

not be made a matter of inquiry on the trial of the principal offense. ALL proceedings are to be had in the Circuit Court of the city of Richmond. It seemed to the revisors unfair to the prisoner, when on trial for a felony, to prejudice his case by alleging and proving on that trial a former conviction at another time and place. The revised section gives the convict an opportunity to deny the existence of the records upon which he is charged.'

This appears in the present Code of Virginia without material alteration as § 53-296, the provision under which petitioner was tried and sentenced to ten years confinement.[8]

A proceeding under § 53-296 is a criminal trial in any sense of the term. By filing an information the Commonwealth of Virginia moves against a person to have him imprisoned in the state penitentiary for a long number of

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[7] "No discretion in fixing the additional time was given [in the 1887 Code]. To mitigate these harsh provisions, the General Assembly in 1916 amended the two sections so as to give the court much discretion in fixing the additional punishment. The revision retains the humane provisions of the amendments of 1916, but goes further and does not permit the subject of prior conviction to be made a matter of inquiry on the trial of the principal offense. All proceedings are to be had in the Circuit Court of the city of Richmond after the convict has been received in the penitentiary." Burks, The Code of 1919, 5 Va. Law Reg. N.S. 97, 106 (1919). See also *McCallister* v. *Commonwealth*, 157 Va. 844, 161 S.E. 67 (1931).

[8] In the United States today 46 states have habitual criminal or recidivist laws. The provisions vary widely on procedure, number and kind of prior offenses, length of sentence, and mandatory and discretionary features of sentencing. See Appendix, *infra* p. 47. The terms habitual criminal and recidivist appear to be synonymous in this country. See Brown, *The Treatment of the Recidivist in the United States*, 23 Can. B. Rev. 640 (1945); Tappan, *Habitual Offender Laws in the United States*, Fed. Prob., Vol. 13, No. 1, p. 28 (1949); Illinois Legislative Council, Habitual Criminal Statutes, Pub. 122 (1955).

years and possibly for life. The nature of the case is indicated by § 53-295, immediately preceding the recidivist statute, which says that "all criminal proceedings against convicts in the penitentiary shall be in the Circuit Court of the city of Richmond." The Virginia Supreme Court of Appeals has spoken of the statute as "highly penal" and of a person's being "prosecuted" under it and his being "tried and convicted as a recidivist." *Wesley* v. *Commonwealth*, 190 Va. 268, 271, 275, 56 S.E. 2d 362, 363, 365 (1949); see also *Wright* v. *Commonwealth*, 109 Va. 847, 65 S.E. 19 (1909). In short, one against whom an information is brought under § 53-296 stands in all respects in the same position as one prosecuted on any criminal charge carrying maximum punishment of life in the penitentiary.

The judge of the Law and Equity Court in this very case recognized this when he characterized the case as "criminal" and said that

> . . . the defendant in such a proceeding has the same rights to a speedy trial, to time for preparation, to insistance [sic] of counsel of his own choice, to compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to most other rights enjoyed by a defendant on trial for a criminal offense (R. 10).[*]

The trial judge nevertheless thought that the information filed against petitioner "did not charge the commission of a new separate offense" (R. 10). But this view of § 53-296 in the Virginia courts is of no importance as far as the federal constitutional right to counsel is concerned. Whatever the label, this was clearly a criminal proceeding the

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[*] See *State* v. *Janiec*, 9 N.J. Super. 29, 33, 74 A.2d 605, 607 (1950), *aff'd*, 6 N.J. 608, 80 A.2d 94, *cert. denied*, 341 U.S. 955 (1951).

object of which was to imprison the petitioner in the penitentiary.[10]

The most striking difference between the recidivist trial and other criminal cases is the unusual power lodged in the trial judge in fixing a recidivist sentence. If, as in Chewning's case, three convictions are alleged and established to the court's satisfaction, the judge apparently has discretion either to impose no additional confinement, to fix a term of years, or to sentence the defendant for life. There is no minimum and no maximum time prescribed. This feature makes a trial under § 53-296 potentially harsher than the usual prosecution. Clearly the defendant's liberty rests to a much greater extent in the hands of a single judge.

B. Petitioner as a Defendant in a Recidivist Case Had the Same Right to Counsel Under the Fourteenth Amendment as a Defendant in Any Other State Criminal Trial Which Could Result in a Penitentiary Sentence.

Since a proceeding to impose a penitentiary sentence on a person under § 53-296 has all the characteristics of the usual state criminal trial, it follows that petitioner should have had all of the Fourteenth Amendment protections, including counsel, which surround any criminal defendant. That the right to counsel covers a recidivist defendant has been made clear by several decisions of this Court. *Reynolds* v. *Cochran*, 365 U.S. 525; *Chandler* v. *Fretag*, 348 U.S. 3; *Gryger* v. *Burke*, 334 U.S. 728. In none of those cases

[10] The hybrid nature of another habitual criminal law is discussed in Note, New Jersey's Habitual Criminal Act, 11 Rutgers L. Rev. 654, 664-66 (1957). And for suggestion of a similar ambiguity in the Florida law, see *Reynolds* v. *Cochran*, 365 U.S. 525, 526 n. 2. Eighteen states appear to authorize a separate proceeding for the habitual criminal charge; in the other states the charge must be brought in connection with the trial of one of the underlying offenses. See Appendix, *infra*, p. 47.

was there any hint of any distinction between a recidivist or habitual criminal proceeding and any other state criminal proceeding as far as the constitutional right to counsel was concerned.[11] Indeed in *Chandler* v. *Fretag* the Court expressly relied on the landmark counsel decision, *Powell* v. *Alabama*, 287 U.S. 45, and on other felony cases involving the right to counsel (348 U.S. at 9-10). The point is too clear for further elaboration.

II

The Court's Refusal of Petitioner's Request for the Assistance of Counsel, in the Circumstances of His Recidivist Trial, Deprived Him of a Fair Hearing in Violation of the Due Process Clause of the Fourteenth Amendment.

A. The Broad Discretion Vested in the Trial Judge in Fixing Sentence—From No Confinement to Life Imprisonment—Necessitated the Presence of Counsel to Protect Petitioner and Insure the Presentation of All Information Relevant to the Sentencing Decision.

The aspect of petitioner's recidivist trial which overwhelmingly demonstrates the need for counsel is the sentencing procedure. Since the Virginia law now gives the trial judge discretion in fixing the length of sentence, it was critically important to the petitioner (and to society) that the fullest possible amount of relevant information be put before the court so that it would have an adequate basis for a rational decision.

Petitioner was sentenced to confinement for ten years in addition to all other sentences. How did the judge arrive at that figure? What information was furnished him and by whom? Here is the heart of the whole matter. For

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[11] See also *Johnson* v. *Kansas*, 284 F.2d 344, 345 (10th Cir. 1960); *State* v. *Janiec*, *supra* n. 9.

clearly § 53-296, as well as justice and modern penology, contemplates that sentencing should not be mechanical.[12] The history of the statute explicitly reveals a legislative judgment that the sentencing of recidivists should be flexible and tailored to fit individual cases.[13]

Thus it would appear that a considerable range of data about the prisoner should be developed: his total record, both in and out of prison; the number and character of all former offenses; the circumstances surrounding the commission of the former offenses; prior gainful employment; the defendant's character, with all that the term implies

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[12] See Frym, The Treatment of Recidivists, 47 J. Crim. L., C. & P.S. 1 (1956): ". . . once we begin to question the wisdom of incarceration and realize its destructive effect in most criminal cases, we need no longer adhere to the artificial classification of offenders in crude categories. We can afford to individually study human beings who have failed and to organize their rehabilitation accordingly. This also is true of any kind of therapeutical approach to recidivists. Only a thorough sociological and clinical study of the individual repeater can guide us in our selection of rehabilitative measures. . . .

"Rehabilitation . . . requires not only thorough understanding of the offender's total personality, body and mind, but also of the environmental forces which have left their imprint and generated extreme tensions since his early childhood. His inability to handle these tensions in a socially acceptable manner has brought him into conflict with the law." See Morris, The Habitual Criminal 8-23 (1951).

[13] See notes 6, 7, *supra*. Whether the statute is administered in accord with the legislative intent is not clear. For examples of lengths of sentences see the following cases in which recidivist sentences were under attack: *Sims* v. *Smyth*, 282 F.2d 814 (4th Cir. 1960) (10 years); *Holly* v. *Smyth*, 280 F.2d 536 (4th Cir. 1960) (10 years, 15 years; total 25); *Morrison* v. *Smyth*, 273 F.2d 544 (4th Cir. 1960) (15 years); *Harvey* v. *Smyth*, 255 F.2d 21 (4th Cir. 1958) (40 years); *Walker* v. *Smith*, 195 Va. 228, 77 S.E.2d 855 (1953) (10 years); *Royster* v. *Smith*, 195 Va. 228, 77 S.E.2d 855 (1953) (10 years); *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953) (10 years); *Willoughby* v. *Smyth*, 194 Va. 267, 72 S.E.2d 636 (1952) (10 years); *Robinson* v. *Smyth*, 190 Va. 724, 58 S.E.2d 4 (1950) (10 years); *Wesley* v. *Commonwealth*, 190 Va. 268, 56 S.E.2d 362 (1949) (10 years).

evidentially. Obviously an adequate presentation of such data calls for preparation and out-of-court investigation—a task that cannot be undertaken by an indigent person locked in the penitentiary. Here the assistance of counsel is essential; it is not a mere luxury. Without counsel there is no assurance that the court will have a complete factual picture. There is accordingly no assurance that a fair sentence will be fairly imposed. It is constitutionally immaterial that petitioner cannot now prove that his sentence would have been different had he had counsel. *Townsend* v. *Burke*, 334 U.S. 736, 741.

This Court has shown its awareness of the need for counsel at the sentencing stage in a case where the judge had a broad discretion. After indicating that a court could find that the defendant who pleaded guilty had, in the particular circumstances, knowingly waived counsel, the Court said:

> But the imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. *Carter* v. *Illinois*, 329 U.S. 173, 178.

The trial judge himself is hardly in a position to undertake the kind of investigation necessary.[14] However, the

[14] Cf. *Powell* v. *Alabama*, 287 U.S. 45, 61: "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it

Circuit Court of the city of Richmond probably has authority to call on a probation or parole officer for help in a recidivist case, since § 53-250 of the Virginia Code directs such an officer to "Investigate and report on any case pending in any court . . . in his jurisdiction referred to him by the court . . ." This investigation and report is made mandatory on defendant's motion in any "felony charge" where a sentence of more than ten years may be imposed.[15] The Virginia Supreme Court of Appeals has never ruled on whether this right is available to a recidivist defendant like petitioner. Clearly it may be of great value since a recidivist defendant is already in prison and cannot personally assemble evidence. Here is an important legal point which only a lawyer can identify and raise. Even if the statute is held not to require a report, the judge might order it as a matter of discretion if asked to do so. But a layman would hardly be aware of this possibility.

The Virginia court has held that where a probation officer's report was given the court, even though not commanded by the statute, the accused must be allowed to

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that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

[15] ". . . the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present." Va. Code, 1950, § 53-278.1.

cross-examine the officer. The court said that the receipt of evidence bearing on the quantum of punishment was "an important part of the trial at which she was entitled to the aid of her counsel." *Linton* v. *Commonwealth*, 192 Va. 437, 441, 65 S.E. 2d 534, 536 (1951).

If the trial judge on his own motion does not call for an investigation and report by a probation officer and if the defendant has no lawyer, the trial judge must of necessity depend chiefly upon the prosecutor. Surely whatever ex parte presentation the prosecution may make cannot be relied upon to reveal fully all information favorable to the accused, nor can it guarantee the kind of fair hearing which due process requires.[16] The whole history of the Anglo-American adversary system teaches this lesson.

In addition to petitioner's right to a fair hearing, there is an important social interest in the administration of a recidivist law in keeping with its purpose and with humane standards of modern penology.[17] This legitimate interest can only be safeguarded if there is present at the recidivist trial counsel for the prisoner as well as counsel for the state. Counsel for a recidivist defendant thus serves something of a dual purpose—he insures a fair trial for the individual defendant, and his presence in that role is some guarantee to society that the recidivist law is properly administered.

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[16] See Hobbs, Prosecutor's Bias, An Occupational Disease, 2 Ala. L. Rev. 40 (1949).

[17] Cf. Mewett, Habitual Criminal Legislation Under the Criminal Code, 39 Can. B. Rev. 43, 56 (1961): "... if you have habitual criminal legislation, you must be prepared to spend a great deal of money and devote a great deal of time in the proper functioning of preventive detention, because preventive detention without money and without time and trouble is savage and degrading to the society which imposes it."

Nothing in § 53-296, its history, or in the judicial decisions dealing with it reveals its precise purpose. But it would appear to have generally the same purpose as other recidivist and habitual criminal laws in the United States. These laws all provide for the imprisonment of a multiple offender for a term in addition to the sentences he serves for the offenses. They have been said to be based on the theory that such persons constitute a special menace to society and that the additional sentence is imposed in the threefold hope of (1) deterring others from joining their ranks, (2) placing as many hardened criminals as possible in long-term confinement where they can do no further harm, and (3) rehabilitating all who are amenable to society's discipline.[18]

The mandatory life sentence which still exists in some 19 states[19] seems to exclude any consideration of rehabilitation and to be based entirely on the theory of deterrence and protection of society. Such a provision embodies a legislative decision that all multiple offenders are beyond reform. Since Virginia took the enlightened step of abolishing mandatory life imprisonment for recidivists it would seem that rehabilitation is to be considered at least as much as other objectives. Certainly the modern trend in the use

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[18] Illinois Legislative Council, Habitual Criminal Statutes, Pub. 122, p. 1 (1955). It has been pointed out that these American laws are unlike the preventive detention acts in Europe and that the American laws do not seem to be concerned with the special type of treatment which the European laws afford; in the United States the habitual criminal is treated like any type of offender "with the possible exception that he usually receives a more severe penalty and is usually sentenced to maximum custody institutions. . . ." Brown, *The Treatment of the Recidivist in the United States*, 23 Can. B. Rev. 640, 645-46 (1945).

[19] Model Penal Code, Explanatory Notes § 7.03, at 39-40 (Tent. Draft No. 2, 1954). The extreme harshness of such mandatory punishment is obvious.

of flexible, moderate sentences is in that direction.[20] And it can be assumed that Virginia at least attempts to administer its criminal law and penal system under sound, modern principles. If this be so, then the need for counsel to represent a recidivist defendant is accentuated. For, in deciding on a sentence that appropriately takes into account rehabilitation of the individual prisoner as well as society's interest in protecting itself and deterring others from crime, a judge is confronted with a complex problem. He needs all the help he can get, and the defendant needs the assistance of counsel to marshal and present the facts. "The term habitual criminal, like the term insane person or criminal sexual psychopath, connotes a combination of legal, sociological and psychological concepts." [21]

Petitioner, already incarcerated in the penitentiary, alone and unaided, was thus faced with matters far beyond his ability to meet. The professional assistance of a lawyer was essential for a fair hearing, and a fair hearing is commanded by due process when the state moves to deprive a man of his liberty for ten years or life.

B. Trial Under the Recidivist Statute Involved Numerous Difficult Legal and Factual Questions Which Made the Assistance of Counsel Essential to a Fair Hearing.

Apart from the judge's unlimited discretion in sentencing, the nature of the proceeding brought against peti-

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[20] See Model Penal Code § 7.03 (Tent. Draft No. 2, 1954) where the American Law Institute takes the position that length of the sentence, if any, is for the judge to fix in each case. The Canadian statute requires a finding that defendant is "persistently leading a criminal life," and the mere fact of three previous convictions will not alone support such a finding; even after the finding is made the sentence is discretionary. Mewett, Habitual Criminal Legislation Under the Criminal Code, 39 Can. B. Rev. 43, 47, 50 (1961).

[21] *Id.* at 49. See generally the excellent study by Norval Morris, The Habitual Criminal (1951). See also Waite, the Prevention of Repeated Crime (1943); 13 Encyc. Soc. Sci. 157-60.

tioner, who was without counsel of his own, was such that the refusal to provide counsel at his request, coupled with the notifying, trying and sentencing of him all in one day, deprived petitioner of his liberty without due process of law.[22]

Examination of § 53-296 and related case law reveals numerous difficult legal and factual questions which a layman would not only be incapable of meeting but would not even identify as questions. As this Court once said, "The nature of the charge emphasizes the need for counsel." *Tomkins* v. *Missouri*, 323 U.S. 485, 488.

To make out a case the state must prove the existence of records of prior convictions and the identity of the prisoner with the person named in each. These matters may be disputed by defendant in a variety of ways. The court decides all questions concerning the records, and a jury tries the issue of identity. While on the surface these issues may not seem complex, a closer look indicates otherwise.

Consider first the existence of records of former convictions. Not only must the records be properly authenticated, but the former convictions must also be valid. The

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[22] Since petitioner rests his case here on denial of counsel he is not arguing that the lack of advance notice of the recidivist trial constituted in itself a violation of due process, although this point has merit. The Tennessee habitual criminal law was twice held unconstitutional because notice failed to meet due process requirements. *Application of Boyd*, 189 F.Supp. 113 (M.D. Tenn. 1959), *aff'd mem. sub nom. Bomar v. Boyd*, 281 F.2d 195 (6th Cir. 1960); *Rhea* v. *Edwards*, 136 F.Supp. 671 (M.D. Tenn. 1955), *aff'd mem.* 238 F.2d 850 (6th Cir. 1956). See *United States ex rel. Collins* v. *Claudy*, 204 F.2d 624 (3d Cir. 1953). The issue of pretrial notice has been argued before this Court in two habitual criminal cases, but on both occasions the Court found the question unnecessary for decision since the right to counsel was held to have been violated. *Reynolds* v. *Cochran*, 365 U.S. 525, 530 n. 8; *Chandler* v. *Fretag*, 348 U.S. 3, 5-6 n. 4. Petitioner does assert, however, that the lack of pretrial notice accentuated his need for the assistance of counsel at the trial.

Virginia court has held that a recidivist sentence cannot be based on a prior conviction which is void; and the validity of any alleged convictions which the state relies on can be inquired into and litigated in the recidivist trial. *Wesley* v. *Commonwealth*, 190 Va. 268, 56 S.E. 2d 362 (1949); see *Royster* v. *Smith*, 195 Va. 228, 77 S.E. 2d 855 (1953). For a former conviction to be a valid basis for a recidivist sentence it must have been adjudged by a court with jurisdiction over the offense and over the person of the defendant; it must have been for an offense punishable by a penitentiary sentence, and defendant must have been actually sentenced to confinement in the penitentiary. Furthermore, violations of Fourteenth Amendment rights in the former trial, such as denial of counsel, will render the conviction invalid and hence no basis for a recidivist sentence. See generally, *Wesley* v. *Commonwealth, supra; Royster* v. *Smith, supra; Willoughby* v. *Smyth*, 194 Va. 267, 72 S.E. 2d 636 (1952). In short, it appears that any ground for collateral attack on the convictions may be raised and litigated. See *Reynolds* v. *Cochran*, 365 U.S. 525, 531 n. 13. All these are problems no uncounselled layman can identify or meet.[23]

Moreover, it is not clear what effect a pardon has on the use of a former sentence in a recidivist trial. The Virginia courts do not appear to have passed on this question. Courts in states where the problem has arisen under habitual criminal laws have taken different positions. Some say the pardon has no effect, and some say that it wipes out

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[23] The record indicates that petitioner was charged with convictions for offenses under Virginia law (R. 5). But § 53-296 subjects to a recidivist sentence any prisoner who has previously "been sentenced to a like punishment in the United States." Thus a conviction from any of the 50 states and the federal courts could be used against a defendant. Questions concerning out-of-state records would obviously present even greater difficulties for a layman in jail.

the conviction. See 25 Am. Jur. Habitual Criminals, § 21, pp. 269-70.

By judicial gloss it appears that if a prior conviction is under appeal it cannot form the basis for a recidivist charge. *White* v. *Commonwealth*, 79 Va. 611 (1884). Moreover, there is doubt whether two prior convictions occurring on the same day or at the same term of court could both be used in a recidivist case. See *Commonwealth* v. *Welsh*, 4 Va. (2 Va. Cases) 57 (1817); *Dye* v. *Skeen*, 135 W. Va. 90, 62 S.E. 2d 681 (1950). These points could be of great importance to petitioner, but without imaginative legal research by a lawyer they would almost surely pass unnoticed. Even an intelligent defendant who carefully read § 53-296 would not be made aware of such subtleties of judicial interpretation.

More fundamentally, the recidivist statute may be vulnerable to constitutional attack on *ex post facto* or double jeopardy grounds. With reference to a similar Florida law, the Court said such questions "certainly cannot fairly be characterized as frivolous." *Reynolds* v. *Cochran*, 365 U.S. 525, 530. In practice there is some evidence that the same conviction may be used in two different recidivist trials. See *Holly* v. *Smyth*, 280 F. 2d 536, 538-39 (4th Cir. 1960), where it appears that a 1942 conviction for storebreaking was used in 1951 to impose a ten-year recidivist sentence on the defendant and was used again in 1957 as part of the basis for a fifteen-year sentence. This practice seems to raise a serious constitutional question necessitating counsel to protect the defendant's rights.

The prosecution must establish the identity of the defendant with the person named in the records. A jury is to be impaneled to try the issue of identity if it is disputed. How is the jury to be selected? On what grounds may such jurors be challenged? Apparently the Virginia court will not

allow peremptory challenges but will recognize challenges for cause. See *Brooks* v. *Commonwealth*, 41 Va. (2 Rob. 845) 882 (1843). How is a prisoner without legal training and experience to know what constitutes cause or how to develop the evidence to prove some ground of challenge? Since by the nature of a recidivist proceeding the defendant will already be in the penitentiary, he is unable personally to conduct any kind of preliminary investigation which would be essential to an informed decision on grounds for challenge.

After a jury is selected the issue of identity is then tried with the prosecuting attorney matched against an indigent convict. Actually the prisoner is confronted by the entire resources of the state. Realistically can it be said that in the marshaling and presentation of evidence this is an evenly matched contest? Even though the defendant may have the "right" to have witnesses summoned and may examine them, who is to do the preliminary investigation, the kind of pre-trial preparation that is indispensable to the adequate presentation of any matter? This Court has fully recognized that pre-trial services of counsel are as essential as counsel during trial. See *Powell* v. *Alabama*, 287 U.S. 45, 68-71; *Avery* v. *Alabama*, 308 U.S. 444, 446; *White* v. *Ragen*, 324 U.S. 760, 763-64; *Hawk* v. *Olson*, 326 U.S. 271, 278. To say that a lone defendant can adequately prepare his case and defend himself is to engage in fantasy.

Section 53-296 provides that for good cause a defendant may have a continuance. Even assuming that petitioner was aware of this, how was he, without the assistance of counsel, to have any idea whether a continuance would be of any benefit? And how is a prisoner himself to investigate and present grounds of good cause? "Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious crim-

inal charge after arraignment is too large to permit speculation on its effect." *Hawk* v. *Olson*, 326 U.S. 271, 278.

In light of this array of legal and factual issues in a recidivist trial it cannot realistically and rationally be said that petitioner had a fair trial without the assistance of counsel.[24] "Law addresses itself to actualities." [25]

It is of course no answer at all to say that this particular record does not show that petitioner attempted to raise any of the issues enumerated above. This is no answer for the very simple reason, already mentioned, that most of the issues could only be recognized as issues by a lawyer. An indigent prisoner is not apt to appreciate these nice legal questions. It would border on the absurd to assert that the failure of the unaided petitioner to raise any issues demonstrates that he had a fair trial. The failure to make an adequate defense or to raise any questions is one of the normal consequences of being unrepresented. Surely no system of rational justice can use the adverse consequences of the denial of counsel as a justification for the denial.

C. The Due Process Clause Required That Petitioner Be Represented by Counsel.

Considering the totality of the circumstances—the nature of a Virginia recidivist trial, the numerous factual and legal issues that may arise, the judge's discretion to imprison petitioner for life, the facts that petitioner was already in the penitentiary and could not help himself, that

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[24] In pointing to only one issue of construction under the Florida second-offender law, this Court said: "We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere existence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value." *Reynolds* v. *Cochran*, 365 U.S. 525, 532-33.

[25] *Griffin* v. *Illinois*, 351 U.S. 12, 23 (concurring opinion).

he had no lawyer of his own, that he expressly requested the assistance of counsel, that all in one day he was notified, tried and sentenced to ten years—considering all these it is clear that the refusal of the court to appoint counsel deprived petitioner of a fair hearing and thus of his liberty without due process of law.[26]

Twice recently this Court has unanimously held that due process was violated by a state court's refusal to allow a defendant on an habitual charge an opportunity to obtain his own counsel. *Reynolds* v. *Cochran*, 365 U.S. 525; *Chandler* v. *Fretag*, 348 U.S. 3. In those cases the Court stressed the need for counsel by one proceeded against as a multiple offender. Everything said there applies to petitioner. Indeed petitioner's need was greater because of the discretionary sentencing power which the Virginia judge had and which the judges in *Reynolds* and *Chandler* did not have.

Also, last term in *McNeal* v. *Culver*, 365 U.S. 109, the Court held, again unanimously, that due process was violated when a twenty-year sentence was imposed in a trial without counsel for defendant. Noting that "the record at least implicitly discloses a number of highly complex legal questions, beyond the comprehension of almost any layman" (365 U.S. at 114), the Court examined generally the

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[26] Petitioner is not particularly concerned with whether this result is reached by an absorption into the Fourteenth Amendment of the Sixth Amendment guarantee of counsel or by a holding that here the right to counsel is one of those fundamental matters embraced by the Due Process Clause itself. Petitioner does assert, however, that this Court's statements about the fundamental nature of the right under the Sixth Amendment apply equally to the right under the Fourteenth Amendment. E.g., "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76; see *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63.

degrees of assault and the kind of intent necessary to guilt —matters not unlike issues in petitioner's recidivist trial.

In *Hudson* v. *North Carolina,* 363 U.S. 697, the petitioner was tried with two co-defendants, one of whom had a lawyer. That lawyer afforded representation to all accused until midway in the trial when he withdrew, leaving the petitioner without representation. Despite its acceptance of findings that petitioner was intelligent and familiar with court procedure, the Court held that due process was denied because of potential prejudice to petitioner from the co-defendant's plea of guilty at the time counsel withdrew. If such potential prejudice (which was not even suggested by petitioner's counsel) was sufficient to show a denial of due process to one who had counsel for half the proceedings, surely due process was denied Chewning who had no counsel at all, thereby suffering much greater potential prejudice.

In *Ferguson* v. *Georgia,* 365 U.S. 570, an even stronger precedent, the Due Process Clause was held to invalidate a state conviction where the defendant had his own lawyer throughout the trial; but his lawyer was not allowed to question him when he made an unsworn statement in accordance with state practice. The decision was rested on the ground that for this portion of the trial the defendant was left without the "guiding hand of counsel" (*Powell* v. *Alabama,* 287 U.S. 45, 69). Surely if it is unconstitutional to compel an accused with counsel to testify, if he cares to testify, without being interrogated by his counsel, *a fortiori* it was unconstitutional to compel Chewning to go to trial completely without any counsel at any stage. In *Ferguson* counsel for the accused was present at all times conducting the trial and could have prepared defendant carefully in advance as to every detail of the unsworn

statement—what to say or not to say, how to phrase the statement, etc. Yet the fundamental fairness of due process prohibited the state from withholding counsel even for one brief interval.

Of course *Ferguson*, as well as *Williams* v. *Kaiser*, *infra*, was a capital case, whereas Chewning faced life imprisonment. But as will be discussed later, this is no longer important in the constitutional right to counsel.

The question here is whether petitioner's habeas corpus petition shows a prima facie violation of the constitutional right to counsel so that he is entitled to a hearing. In this posture the case is parallel to *Williams* v. *Kaiser*, 323 U.S. 471:

	Williams v. Kaiser	Chewning v. Cunningham
State sentence	15 years	10 years
Imposed for	robbery	recidivism
Collateral attack by	state habeas corpus	state habeas corpus
Petitioner's allegations	"Prior to his conviction and sentence, as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty."	"That the Circuit Court . . . proceeded to try and convict, and sentence the petitioner to imprisonment . . . for the . . . period of ten years . . . without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958."
State Court's disposition of habeas corpus	denial without response and without a hearing	denial without response and without a hearing

The cases thus present no material differences.[27]

In *Williams* v. *Kaiser* the Court held that "the petition makes a *prima facie* showing of denial of the constitutional right." (323 U.S. at 474.) The opinion pointed to matters of state law which could be involved in a robbery case, such as degrees of the offense, the kind of evidence required for conviction, and various defenses available—questions quite similar to those which could arise in a Virginia recidivist trial, as discussed above. Chief reliance was placed on *Powell* v. *Alabama*, 287 U.S. 45, and from it the Court quoted language which has grown in persuasiveness with the passage of nearly thirty years. Its unimpeachable appeal to reason and to the fundamental sense of fairness which is central to due process makes it worth quoting again:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of

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[27] According to the trial court's order, Chewning acknowledged "that he is the person mentioned in the several records of conviction" (R. 7). Since there is no showing that Chewning raised questions concerning the records, this acknowledgment seems analogous to a plea of guilty without counsel, as in *Williams* v. *Kaiser*. This court has held several other times that a sentence based on a plea of guilty by an uncounseled accused worked a deprivation of liberty without due process. *E.g.*, *Uveges* v. *Pennsylvania*, 335 U.S. 437; *Townsend* v. *Burke*, 334 U.S. 736; *Rice* v. *Olson*, 324 U.S. 786; *Tomkins* v. *Missouri*, 323 U.S. 485.

> counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. *Powell* v. *Alabama*, 287 U.S. 45, 69.

That passage has been cited time and again by this Court. It commands that petitioner's trial without counsel be set aside. This Court must either repudiate that language and the whole spirit of the opinion or it must hold that petitioner is unconstitutionally imprisoned.

The only possible argument that can be made against granting petitioner relief is the now outmoded distinction between capital and noncapital state criminal cases. That distinction, applied to the right to counsel and to no other constitutional right, stems from *Betts* v. *Brady*, 316 U.S. 455. It never attracted more than a bare majority of the Court. It was under constant criticism from its inception, not only by a substantial minority of the Court[28] but also by legal writers.[29] In retrospect it seems clear that *Betts*

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[28] See, *e.g.*, *Betts* v. *Brady*, 316 U.S. 455, 474 (dissenting opinion); *Foster* v. *Illinois*, 332 U.S. 134, 139 (dissenting opinion); *Bute* v. *Illinois*, 333 U.S. 640, 677 (dissenting opinion); *Gibbs* v. *Burke*, 337 U.S. 773, 782 (concurring opinion); *McNeal* v. *Culver*, 365 U.S. 109, 117 (concurring opinion). See also *Uveges* v. *Pennsylvania*, 335 U.S. 437, 440-41; *Palmer* v. *Ashe*, 342 U.S. 134, 135n.

[29] Among the many law review comments on the problem see Green, The Bill of Rights, The Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 876-84 (1948); Fellman, The Federal Right to Counsel in State Courts, 31 Neb. L. Rev. 15 (1951); Racknow, The Right to Counsel—Time for Recognition Under the Due Process Clause, 10 W. Res. L. Rev. 216 (1959); Notes, 21 Chi.-Kent L. Rev. 107 (1942); 16 So. Calif. L. Rev. 55 (1942); 23 Tex. L. Rev. 66 (1944); 38 J. Crim. L. & C. 375 (1947); 1 Ala. L. Rev. 75 (1948); 37 Geo. L. J. 109 (1948); 1948 Wis. L. Rev. 235 (1948); 4 Ark. L. Rev. 177 (1950); 48 Mich. L. Rev. 521

v. *Brady* was an unwise dilution of the fundamental right to counsel.

The distinction was an anomaly in the law, for no other due process protection in state prosecutions depended on whether the accused could be sentenced to death or to life imprisonment. The Fourteenth Amendment proscribes the use of coerced confessions in capital and noncapital cases; likewise a state cannot constitutionally exclude members of defendant's race from the jury in any prosecution.[30] But strangely enough, the right to counsel, which is fundamental because upon it depends the assertion of all other rights, was singled out and thought not to extend to all state criminal defendants.

(1950); 26 Temple L. Q. 86 (1952). No legal commentary has been found favorable to the rule of *Betts* v. *Brady*. See also Letter from Benjamin V. Cohen and Erwin N. Griswold to the Editor of the N. Y. Times, N. Y. Times, Aug. 2, 1942, § 4, p. 6E, cols. 5, 6, 7: [after a critical analysis of *Betts* v. *Brady*] "Most American lawyers and laymen alike—before the decision in *Betts* v. *Brady*—would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in *Betts* v. *Brady* would not wish their decision to be used to discredit the significance of the right and the importance of its observance.

"Yet at a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

[30] The Court's many opinions in confession and jury exclusion cases from state courts are devoid of suggestion that due process protections in those areas are any different in capital and noncapital prosecutions. The confession cases were most recently canvassed in *Reck* v. *Pate*, 81 Sup. Ct. 1541. Moreover, last term the Court chose a noncapital case as the occasion to extend to state defendants the constitutional protection against the admission of unconstitutionally seized evidence. *Mapp* v. *Ohio*, 81 Sup. Ct. 1684.

The rule which evolved from *Betts* v. *Brady* was that although in a state capital case the accused had an absolute right to counsel under the Fourteenth Amendment in a state noncapital prosecution this constitutional right existed only if there were "exceptional circumstances" showing that counsel was necessary to a fair hearing. See *Bute* v. *Illinois*, 333 U.S. 640, 676-77. This carried the extraordinary inference that under ordinary circumstances an accused not trained in the law was fully capable of defending himself in court against a professional prosecuting attorney. The rule was of course far out of contact with reality. Lawyers who can recall their first fumbling efforts as neophytes at the bar can testify to this. It is well-known that even a college education and a degree from an approved law school do not really equip a man to go immediately into a courtroom. Actual experience in litigation with guidance from a seasoned practitioner is still a necessary supplement to formal legal education. How then can it be expected that one without any legal education or training can adequately match himself against the lawyer for the state? "There is no war between the Constitution and common sense." [21] If the rule of *Betts* v. *Brady* were sound it would make an excellent argument for drastically lowering requirements for admission to the bar. Furthermore the state would not need a person trained in the law to handle the prosecution, much less a staff to back him up.

Another serious defect in the rule was that it placed upon one who had been tried and sentenced without a lawyer the burden of proving retrospectively that in some tangible, specific way he had been prejudiced.[22] There was a pre-

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[21] *Mapp* v. *Ohio*, 81 Sup. Ct. 1684, 1693.

[22] "Surely the majority [in *Betts* v. *Brady*], in adopting Bond's position that counsel could have done little or nothing for the defendant, was pursuing a line of reasoning which would in-

sumption, so to speak, of no prejudice from being tried without counsel. The realities of litigation, however, support just the opposite presumption—that in general a person is prejudiced and does not have assurance of a fair hearing without counsel. Moreover, a convicted state prisoner is not saddled with such a burden in claiming other Fourteenth Amendment rights. If a coerced confession is used against him, his conviction is void without more; he is not required to prove that it was not true or that it was necessary to support his conviction.[33] Likewise, if he establishes that members of his race were excluded from the jury on racial grounds he need go no further; the Court does not inquire whether this in fact worked to his detriment.[34] And so it should be with the right to counsel.

Many other sound arguments have been made against *Betts* v. *Brady*. As the Court is doubtless familiar with them all, they will not be repeated.[35] Happily this constitutional anomaly engrafted on the right has been on the demise for some time.

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evitably destroy all rights. Rights are agreed upon in order to insure that justice will be done prospectively, in the ordinary run of affairs. To hold that an individual can be deprived of rights except in those cases where a retrospective view of events reveals a shocking situation is to defeat the whole rationale of the rule of law." Beaney, The Right to Counsel in American Courts 163 (1955).

[33] See *Rochin* v. *California*, 342 U.S. 165, 173; *Blackburn* v. *Alabama*, 361 U.S. 199, 206.

[34] This inference is drawn from the Court's unconcern in its opinions with whether the defendant was actually prejudiced. See cases collected in *Eubanks* v. *Louisiana*, 356 U.S. 584, 585 n. 1.

[35] See notes 28, 29, *supra*. Cf. *Kinsella* v. *Singleton*, 361 U.S. 234, 244.

While the Court has not yet had an occasion expressly to publish the obituary,[35] it is clear from recent opinions that the old distinction is dead. It only remains for the Court to make the formal announcement that the Constitution requires that a person have the assistance of counsel whenever the state moves to imprison him in the penitentiary for any substantial length of time.

It is significant that in holding that civilian dependents of servicemen overseas have a constitutional right to jury trial in noncapital cases the Court squarely rejected the view that a noncapital charge might stand on a different constitutional footing than a capital charge. *Kinsella* v. *Singleton*, 361 U.S. 234, 246-247. After citing *Powell* v. *Alabama* and *Betts* v. *Brady*, which were used in support of the rejected view, the Court said:

> Obviously Fourteenth Amendment cases dealing with state action have no application here, but if they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here, an infamous case by constitutional standards, would be as invalid under those cases as it would be in cases of a capital nature (361 U.S. at 246-47).

Then just last term in *Ferguson* v. *Georgia*, 365 U.S. 570, when it held due process to be violated when an accused's own counsel was not allowed to question him during his unsworn statement, the Court stated:

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[35] Two members of the Court concurring in *McNeal* v. *Culver*, 365 U.S. 109, 117, thought that the appropriate moment was then at hand. An Appendix to their opinion (365 U.S. at 119) gives an up-to-date compilation of all state laws relating to the appointment of counsel. Even in the military system where courts-martial, unlike ordinary criminal trials, are viewed to a large extent as disciplinary measures, the right of the accused in a general court martial to have trained legal counsel is absolute. Arts. 27, 38(b), UCMJ, 64 Stat. 117, 120 (1950); *United States* v. *Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

> Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel (365 U.S. at 596).

Short of a square holding, this seems to be as clear a statement as could be made that the right to counsel does not depend on whether a capital sentence can be imposed.

Over the last three terms the Court has decided with full opinion five cases from state courts where petitioners claimed denials of the right to counsel.[37] Each of these was decided in favor of the petitioner. *Reynolds* v. *Cochran,* 365 U.S. 525; *McNeal* v. *Culver,* 365 U.S. 109; *Ferguson* v. *Georgia,* 365 U.S. 570; *Hudson* v. *North Carolina,* 363 U.S. 697; *Cash* v. *Culver,* 358 U.S. 633. All except *Ferguson* were noncapital cases. And all but *Hudson* were decided without a dissenting vote. In *Hudson* the two dissenters asserted that the majority opinion "without so much as mentioning *Betts* v. *Brady* . . . cuts serious inroads into that holding. . . ." (363 U.S. at 704.) Petitioner submits this is correct, with the qualification that *Betts* v. *Brady* had already been inroaded and undermined for some time. It was bound to be, for it could not withstand the force of reason. Whatever its validity may have been, it has been eroded by 19 years of experience and reflection.

These latest opinions show that the members of this Court are really no longer concerned with the capital-noncapital aberration which was never injected into any other constitutional right. If it is fundamentally unfair for

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[37] Another, *Bushnell* v. *Ellis,* 366 U.S. 418, was decided per curiam for petitioner. Three Justices dissented for reasons not touching the merits.

a man to be tried without counsel when he may be sentenced to death or a term of years it is no less fundamentally unfair to try petitioner without counsel when he may be sentenced to life imprisonment or a term of years. To draw any line here is to draw a line between life and liberty which is not in the Fourteenth Amendment. Life and liberty stand on equal footing. The state is forbidden to take either without due process.

Since the whole course of decisions in recent years points toward this, the Court should make the matter clear by an opinion to that effect. Cf. *Mapp* v. *Ohio*, 81 Sup. Ct. 1684. However, all that need be decided in this case is that a ten-year penitentiary sentence imposed in a Virginia recidivist trial upon petitioner without counsel (there being no waiver of the right to counsel) deprived petitioner of liberty without due process of law."

" *Gryger* v. *Burke*, 334 U.S. 728, does not stand in the way of sustaining petitioner's claim. That case was decided 13 years ago by a sharply divided court. Even within the five members of the majority there was not complete accord, as some preferred to affirm the judgment on the ground that the attack on the sentence was premature (334 U.S. at 729). In at least two respects the case was unlike the instant case. Petitioner there, unlike Chewning, did not request counsel at his habitual criminal proceeding, although he had been a defendant in eight previous trials. Furthermore, the majority opinion found that the only question was that of identity. As demonstrated earlier in this brief, there are many other issues in a Virginia recidivist trial. The Court today seems to have a much more realistic view of such a proceeding, for in the unanimous opinion in *Reynolds* v. *Cochran*, 365 U.S. 525, 531-32, it said that to contend that identity is the only issue "seems to constitute an oversimplification of the matter." It is indeed difficult to reconcile the *Reynolds* and *Gryger* opinions. *Gryger* was not even cited in *Reynolds*. The thrust of *Reynolds* compels the conclusion that *Gryger* has been interred although it was not present at its own funeral. Such a development was inevitable since the *Gryger* majority had relied on the slim majority in *Bute* v. *Illinois* which in turn had relied on the now defunct capital-noncapital distinction of *Betts* v. *Brady*. Thus, like its underpinnings, *Gryger* has succumbed to reason and experience.

"'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." [29] Regardless, therefore, of any one-time justification for the *Betts* v. *Brady* rule, the constitutional right to counsel must be viewed anew today—in the realities of the third quarter of the Twentieth Century. This Court knows, as all the world knows, that Western Civilization is being challenged by massive forces which take a different view of the relation of the individual to the state. The startling awareness of the techniques of the police state—concentration camps, political trials, brainwashing, and so on—which has emerged from World War II and the aftermath, has put the right to counsel in new perspective. This right can now be seen as perhaps the strongest guarantee against such practices. The right to counsel reflects a fundamental difference between Western Civilization's age-long tradition of government under law and the authoritarian views of the opposing forces. "Due process" appropriately embodies such fundamentals. And it is inconceivable that this Court today would hold that in the United States it is compatible with due process for a man to be brought before a court—alone, unassisted, and without money—and sentenced to ten years imprisonment. The Constitution commands that no man's liberty be taken for a long number of years without an opportunity for him to be fairly heard; and to be fairly heard he must have the assistance of legally trained counsel.

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[29] *Griffin* v. *Illinois*, 351 U.S. 12, 20-21 (concurring opinion). See also *Rochin* v. *California*, 342 U.S. 165, 169-72.

III

Petitioner Who Had No Counsel of His Own Was Denied the Equal Protection of the Laws by the Court's Refusal to Allow Him Counsel Because Virginia Law Allows Counsel in Recidivist Trials for Defendants who Are Financially Able to Obtain Counsel.

In the Fourteenth Amendment the Equal Protection Clause and the Due Process Clause constitute two separate prohibitions on state action. Though both clauses embody living, evolving concepts of justice under law and though at times they may overlap, they are nevertheless directed somewhat differently. Wholly apart from due process and the problem raised by *Betts* v. *Brady*, petitioner's right to counsel can be sustained in this case under the Equal Protection Clause.

The proposition involved is simple: equal protection requires that a state have a rational basis for treating individuals or groups differently from other individuals or groups. Money or the lack of it does not supply such a basis for the administration of the criminal law. Therefore if the law allows a defendant with money to have counsel but denies counsel to a defendant without money, the latter is denied the equal protection of the laws.

Griffin v. *Illinois*, 351 U.S. 12, has quickly become a landmark in American constitutional law. Petitioner there had been convicted of a noncapital offense and was allowed an appeal by state law as a matter of right. In order to have trial errors reviewed adequately, however, a transcript was necessary, and that cost money. Petitioner was indigent and therefore could not obtain the needed transcript. This Court held that the state violated both the Due Process and Equal Protection Clauses in that it denied effective appellate review to the poor while making it available to

all who had money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (351 U.S. at 19).[40]

This rationale was thereafter applied in *Burns* v. *Ohio*, 360 U.S. 252, and in *Smith* v. *Bennett*, 365 U.S. 708. In *Burns* the requirement by the Ohio Supreme Court of a $20 fee for the filing of an appeal was held violative of equal protection when applied to an indigent defendant attempting to appeal his conviction. And in *Smith* v. *Bennett* the Iowa requirement of a $4 filing fee for habeas corpus petitions was held to deny equal protection to a convicted state prisoner without money.

Shortly after the *Griffin* decision Justice Schaefer of the Illinois Supreme Court, in his Oliver Wendell Holmes Lecture at the Harvard Law School, said:

> *Griffin* v. *Illinois* was based largely, if not entirely, upon the equal protection clause. Shortly stated, it held that since Illinois permits review of all aspects of a criminal case if, but only if, the defendant is able to put before the reviewing court a full transcript of the trial-court proceedings, it must furnish the same review to those who are unable to pay the court reporter for writing up the transcript. The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer. Since indigence is constitutionally an irrelevance, it would seem that a successful argument might be based upon the proposition that

[40] *Griffin* was followed in the similar case of *Eskridge* v. *Washington State Board*, 357 U.S. 214.

> the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it."[41]

The analogy is indeed close—it is compelling. In Illinois a man with money could appeal with a transcript; a man without money could appeal but he would have no transcript. Thus the Court said that for the indigent appellate review would not be "effective" or "adequate." The difference in the kind of trial turned solely on the pocketbook—an irrational and constitutionally impermissible basis for difference in the quality of justice.

In a Virginia recidivist proceeding a man with money gets a trial with counsel; a man without money gets a trial without counsel. Whatever one's views are on the absolute necessity of counsel, it cannot be denied that a defendant with counsel gets a more "adequate" and "effective" hearing —a higher quality trial—than a defendant without counsel. Thus in a recidivist case "the kind of trial a man gets depends on the amount of money he has" (351 U.S. 19). And as the Court said in *Griffin*, "there can be no equal justice" where that is the case.

That the rationale of *Griffin* requires appointment of counsel for an indigent state criminal defendant has been asserted by several other scholars and judges, including United States Circuit Judge Hamley.[42] Professor Walter

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[41] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 10 (1956) (footnote omitted).

[42] Hamley, The Impact of Griffin v. Illinois on State Court-Federal Court Relationships, 24 F.R.D. 75, 79 (1960). In *People* v. *Breslin*, 4 N.Y.2d 73, 149 N.E.2d 85 (1958), a dissenting judge, contending that *Griffin* required appointment of counsel on an indigent's appeal, said: "The Federal cases cited as precedents [*Betts* v. *Brady*, *Bute* v. *Illinois*] have been shorn of their value as controlling authority by the recent decision . . . in *Griffin* v. *Illinois*. . . ." (4 N.Y.2d at 79, 149 N.E.2d at 88). See also Judge Traynor's opinion in *People* v. *Brown*, 357 P.2d 1072, 1076 (Calif.

Gellhorn, in his recent book, *American Rights,* discusses the right to counsel in connection with *Griffin* v. *Illinois* and *Burns* v. *Ohio* and concludes: "There is a very close resemblance between these two cases and the right-to-counsel case. The lesson they seemingly teach is that the nature and effectiveness of procedural safeguards should never be allowed to hinge on the size of the defendant's pocketbook." [43] And more emphatically, it has been said that the application of *Griffin* to the counsel cases "should be inevitable." [44] With this the petitioner here agrees.

The idea behind *Griffin* and its progeny is not really new. Two decades ago a member of this Court wrote: "The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." [45] Imagine a law which had the effect of allowing counsel to defendants of one race but not to defendants of another race. Or a law which would allow counsel to a defendant only if he had a net worth of $5,000. That such would be unconstitutional is hardly debatable. Here the law of Virginia has substantially the same effect: it allows counsel to a recidivist defendant with money; it denies counsel to a recidivist defendant without money. In doing so it has denied to petitioner the equal protection of the laws because it bases the right to counsel solely on money. Surely

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1960). See Note, Indigent's Right to Counsel on Appeal, 11 W.Res. L. Rev. 649 (1960). That *Griffin* requires appointment of counsel in the trial court has been argued in the Fourth Circuit; although the court set out the argument, it found the question unnecessary for decision. *Holly* v. *Smyth,* 280 F.2d 536, 541-42 n. 8 (4th Cir. 1960).

[43] Gellhorn, American Rights 24 (1960).

[44] Willcox and Bloustein, The Griffin Case—Poverty and the Fourteenth Amendment, 43 Corn. L. Q. 1, 23 (1957).

[45] *Edwards* v. *California,* 314 U.S. 160, 184-85 (concurring opinion).

counsel is as important to an "adequate" and "effective" defense as a transcript.

This point was anticipated long ago by two able lawyers in their criticism of *Betts* v. *Brady*:

> Certainly if the defendant had been able to employ counsel the Maryland court would not have denied him the right to be represented by counsel. . . . If defendants with means have the right to employ counsel to represent them where accused of serious crime, it is difficult to maintain that indigent persons are in fact accorded the equal protection of the laws when that right is denied them because they are not in possession of funds.[46]

Beginning with *Griffin* in 1956 this Court has several times squarely recognized the proposition that when the state moves to take a man's liberty the constitutional safeguards which surround him cannot be diluted by the state because of his poverty. Naturally and inevitably this proposition must extend to the right of representation by counsel. This right is the most basic of all, for without it all other rights are meaningless.

Accordingly this case can and should be decided for petitioner under the Equal Protection Clause. The decision can rest on this ground alone, without reference to the Due Process Clause, although happily both of these Fourteenth Amendment safeguards have now reached the same point along the path of human decency.

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[46] Letter from Benjamin V. Cohen and Erwin N. Griswold to the Editor of the N. Y. Times, N. Y. Times, Aug. 2, 1942, § 4, p. 6E, cols. 5, 6, 7.

CONCLUSION

For all of the reasons set forth, it is submitted that the trial and sentencing of petitioner without counsel violated both the Due Process and Equal Protection Clauses. Thus if petitioner proves his allegations he is entitled to release from imprisonment under his ten-year recidivist sentence. The Virginia courts accordingly erred in dismissing his habeas corpus petition. The judgment of the Supreme Court of Appeals of Virginia should therefore be reversed and the case remanded with directions that petitioner be accorded a hearing.

Respectfully submitted,

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August, 1961

APPENDIX

Habitual Criminal or Recidivist Laws in the United States

The accompanying table lists all state statutes of the general multiple-offender type. These vary considerably in their details. Such laws exist in all states except Hawaii, Maryland, Mississippi, and North Carolina. There is no general federal recidivist statute, although there are several provisions in federal law dealing with subsequent offenders in certain cases.

Procedurally, it appears that 18 states authorize an independent, separate trial for the habitual criminal charge: Alaska, Delaware, Florida, Illinois, Louisiana, Minnesota, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia, Wisconsin.

Where there is no separate proceeding the case is combined in some fashion with the trial of a principal offense. The habitual criminal charge may be tried concurrently with the principal offense, or there may be provisions for trying it immediately following.

The prescribed sentences vary widely, as does the number of prior convictions required for various sentences. Life imprisonment is expressly authorized under some circumstances in 26 states: Alaska, California, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wyoming.

In other states, such as Virginia, life imprisonment is not expressly authorized, but it appears to be allowable.

There is a survey of many of the legal problems which arise under these statutes in Note, *Court Treatment of*

General Recidivist Statutes, 48 Colum. L. Rev. 238 (1948). There are specific discussions of the laws of three states in the following: Brown, *West Virginia Habitual Criminal Law,* 59 W. Va. L. Rev. 30 (1956); Note, *New Jersey's Habitual Criminal Act,* 11 Rutgers L. Rev. 654 (1957); Comment, *Out of Sight, Out of Mind: The Plight of the Habitual Criminal,* 26 Tenn. L. Rev. 259 (1959).

For additional material on recidivist laws in the United States see the authorities cited in notes 8, 18, 19, 21, *supra.*

Habitual Criminal or Recidivist Laws in the United States

Ala. Code tit. 15, § 331 (1958)
Alaska Comp. Laws (Territorial) §§ 66-21-1 - 66-21-5 (1949)
Ariz. Rev. Stat. §§ 13-1649, -1650 (1956)
Ark. Stat. §§ 43-2328 - 43-2330 (Supp. 1959)
Cal. Penal Code §§ 644, 1093
Colo. Rev. Stat. ch. 39, §§ 13-1 - 13-3 (1953)
Conn. Gen. Stat. Ann. §§ 54-118 - 54-121 (1958)
Del. Code Ann. tit. 11, § 3911 (Supp. 1960)
Fla. Stat. Ann. § 775.11 (1941), § 115.09 (Supp. 1960)
Ga. Code Ann. § 27-2511 (Supp. 1958)
Idaho Code tit. 19, § 2514 (1947)
Ill. Ann. Stat., tit. 3, §§ 603.2 - .9 (Supp. 1960)
Ind. Stat. Ann. §§ 9-2207, 2208 (1956 Replacement Vol.)
Iowa Code Ann. §§ 747.1 - .7 (1946)
Kan. Gen. Stat. § 21-107a (1949)
Ky. Rev. Stat. § 431.190 (1955)
La. Rev. Stat. tit. 15, § 529.1 (1950)
Me. Rev. Stat., ch. 149, § 3 (1954)
Mass. Gen. Laws Ann. ch. 279, § 25 (1958)
Mich. Stat. Ann. §§ 28.1082 - .1085 (1936)
Minn. Stat. Ann. ch. 610, §§ 28 - 31 (1945)
Mo. Ann. Stat. §§ 556.280 - .290 (Supp. 1960)
Mont. Rev. Code §§ 94-4713 - 94-4715 (1947)
Neb. Rev. Stat. §§ 29.2221, .2222 (Reissue Vol. 1956)
Nev. Rev. Stat. §§ 207.010 - .020 (1960)
N.H. Rev. Stat. Ann. §§ 591:1, :2 (1955)
N.J. Stat. Ann. §§ 2A:85-8 - 85-13 (Supp. 1960)
N.M. Stat. Ann. §§ 41-16-1 - 41-16-4 (1953)
N.Y. Consol. Laws Serv. §§ 1020, 1940, 1942 (1951), §§ 1941, 1943 (Supp. 1960)
N.D. Century Code Ann. §§ 12-06-18 - 12-06-23, 14-03-07 (1960)
Ohio Rev. Code Ann. §§ 2961.11 - .13 (1953)
Okla. Stats. tit. 21, §§ 51, 54 (1951)
Ore. Rev. Stat. §§ 132.540, 168.011 - .050 (Replacement Part) (1959)
Pa. Code Ann. tit. 18, § 5108 (1939)

R.I. Gen. Laws § 12-19-21 (1956)
S.C. Code §§ 16-21 - 16-23 (1952)
S.D. Code § 13.0611 (1939)
Tenn. Code Ann. §§ 40-2801 - 40-2807 (1955)
Tex. Penal Code tit. 2, arts. 61-64 (1952)
Utah Code Ann. tit. 76, §§ 1-18, 1-19 (1953)
Vt. Stat. Ann. tit. 13, § 11 (1958)
Va. Code Ann. § 53-296 (1950)
Wash. Rev. Code § 9.92.090 (1956)
W. Va. Code Ann. §§ 6130-31, 6260 (1955)
Wis. Stat. Ann. §§ 939.62, 959.12 (1958)
Wyo. Stat. §§ 6-9 - 6-11 (1957)